

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 195 and Gulf Oil Corporation and Naylor Industries, Inc. Case 23-CD-428

November 26, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Gulf Oil Corporation, herein called Gulf, alleging that United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 195, herein called Pipefitters, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activities with an object of forcing or requiring Gulf to assign certain work to employees represented by Pipefitters rather than to employees of Naylor Industries, Inc., herein called Naylor, and S.I.P. Engineering, Inc.

Pursuant to notice, a hearing was held before Hearing Officer Arthur Safos on August 24, 1982, in Houston, Texas. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, Pipefitters and Gulf filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings made by the Hearing Officer at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYERS

The parties stipulated, and we find, that Gulf is a Pennsylvania corporation which maintains its principal office and place of business in Pittsburgh, Pennsylvania; various offices throughout the United States of America, including Houston, Texas; and a refinery in Port Arthur, Texas, where it is engaged in the business of refining and processing crude oil into various petroleum distillate products, including gasoline. During the 12 months preceding the hearing, Gulf received gross revenues in excess of \$1 million at its refinery operations in Port Arthur, Texas, and in connection

therewith purchased goods and materials valued in excess of \$50,000 which originated from points and places located outside the State of Texas and were shipped directly to its Port Arthur, Texas, refinery.

The parties stipulated, and we find, that S.I.P. Engineering, Inc., is a Delaware corporation with its principal office and place of business in Houston, Texas, where it is engaged in the building construction and engineering business as a general contractor. It is acting as general contractor for Gulf at Gulf's Port Arthur, Texas, refinery under various contracts valued in excess of \$5 million. During the 12 months preceding the hearing, it purchased goods and materials valued in excess of \$50,000 which were shipped directly to its Port Arthur, Texas, jobsite for Gulf from points and places located outside the State of Texas.

The parties stipulated, and we find, that Naylor is a Texas corporation with its principal office and place of business located in Pasadena, Texas, where it is engaged in the building construction industry in the performance of maintenance and repair work for industries and municipalities. Under a subcontract from S.I.P. Engineering, Inc., Naylor is currently working on Gulf's Port Arthur, Texas, refinery dredging a wastewater treatment pond. In connection therewith Naylor is also constructing a 14,000-foot, 8-inch polyethylene pipeline to carry the discharge from the dredging operations. This contract is valued in excess of \$1 million. During the 12 months preceding the hearing, Naylor purchased goods and materials valued in excess of \$50,000 which were shipped from points and places located outside the State of Texas.

Accordingly, we find that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that Pipefitters is a labor organization within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. Background and Facts of the Dispute

On June 15, 1982, Gulf awarded a general contract for the improvement of wastewater facilities in its Port Arthur, Texas, refinery to S.I.P. Engineering. This award was partially based on S.I.P. Engineering's subcontracting part of that work, the dredging of a surface drainage collection basin known as Separator No. 2, to Naylor. This dredging involved the removal of settled solids by cut-

ting the settlement with a floating barge and pumping the stirred solids through a temporary dredge discharge line to a designated disposal area approximately 14,000 feet away. The discharge line was to consist of fused 40-foot sections of 8-inch polyethylene pipe, assembled by manually placing the ends of sections into a butt-fusion machine which heated the ends to fuse them together.

Naylor previously had performed similar dredging operations at the refinery which required fabricating and laying up to 8,000 feet of polyethylene pipe. Naylor had also done similar work for other companies in the area, and had done field research for the manufacturer of the pipe in the development and refinement of the butt-fusion process. At all times Naylor had assigned the work of joining, welding, carrying, and laying this pipe to its unrepresented employees. Prior to this proceeding Pipefitters had never disputed this assignment.

Naylor began work on the dredging of Separator No. 2 in July 1982. On a Friday at the end of July, Little, business agent for Pipefitters, called Seymour, a senior buyer for S.I.P. Engineering. According to Seymour's uncontradicted testimony, Little asked him to look into the work being done by Naylor at the refinery. Seymour told Little he would get back to him. On the following Wednesday, Little called again, and Seymour told him the laying of the dredge discharge line was subcontracted to Naylor, and S.I.P. Engineering wanted Naylor to do the work. Little responded that he "felt that it was pipe fitters' work and that he would have to put a stop to it." According to Seymour, Little further stated he "realized Naylor has been doing work in here before, like laying two, three, 400 feet of pipe. He said that was okay, but this 11,000 feet was too much."

On August 4, Little called Breaux, Gulf's vice president of industrial relations. According to Breaux, Little said the pipeline was "going to be about two miles, and that they had no problems with Naylor in the past laying small amounts of line from tanks over the dike and that sort of thing, but in this particular case, since it was such a long distance of line that was being laid, he felt like it was work that his membership should be doing." The next morning Breaux told Little the contract had been given to S.I.P. Engineering and in turn to Naylor, so it was Naylor's business. Little responded that "if the situation could not be corrected, that they would have to put up a picket line on some of our gates."

On Friday, August 6, Pipefitters established a picket line at Gate No. 32 and Gate No. 49 of Gulf's refinery, gates which Little testified he understood Naylor's employees were authorized to

use. Cassidy, a labor relations assistant for Gulf, testified he went to Gate No. 32, where he met Little and asked him what the dispute concerned. According to Cassidy, Little responded that Naylor was laying plastic pipe throughout the refinery, that "if it was only a few feet of pipe going from maybe a conduit to a tank or so, it wouldn't be any problem," but that "they are laying about a mile of pipe within the refinery, and that was pipe fitter work." Little went on to say that his "local has done that work before," and concluded the conversation by saying that "this was Local 195 work." The pickets carried signs reading "PIPE-FITTERS LOCAL 195 PROTESTS NAYLOR NO CONTRACT." However, Little admitted that at no time did he ask Naylor to sign a contract, solicit employees to join Pipefitters, distribute organizational literature, or make inquiries as to the wages and working conditions of Naylor employees. As a result of the picketing, Naylor's employees and employees of other contractors did not report to work. The picketing continued, but only at Gate No. 32, until Thursday afternoon, August 12. Thereafter, all employees returned to work. At the time of the hearing, approximately 5 percent of the dredging operation was complete, and approximately 90 percent of the plastic pipe was in place.

B. The Work in Dispute

The parties stipulated,¹ and we find, that the work in dispute is the joining, welding, carrying, and laying of 8-inch polyethylene pipe from a wastewater treatment pond for a distance of approximately 14,000 feet at the Gulf Oil Refinery in Port Arthur, Texas, which work is currently being performed by the employees of Naylor Industries, Inc.

C. Contentions of the Parties

Pipefitters contends that there is no reasonable cause to believe that it has violated Section 8(b)(4)(D) and that, therefore, the dispute is not properly before the Board and the notice of hearing should be quashed.² It further asserts that there is no jurisdictional dispute between it and any group of employees employed by Gulf or Naylor.

¹ Pipefitters took the position that there was no jurisdictional dispute involved, but that, if there were a jurisdictional dispute, the above description of the work involved would be accurate.

² On August 18, 1982, Pipefitters filed with the Regional Director a motion to quash the 10(k) notice of hearing. On August 19, 1982, the Regional Director denied the motion without prejudice to refiling either at the hearing with the Hearing Officer for referral to the Board for ruling or with the Board following close of the hearing and transfer of the proceeding to the Board. Prior to the close of the hearing, Pipefitters orally renewed the motion with the Hearing Officer, who referred it to the Board for ruling. In view of our decision herein, we hereby deny the motion to quash.

Rather, it contends that the picketing was directed solely at Naylor for the purpose of protesting sub-standard wages and benefits provided by Naylor to its employees or at most for the purpose of obtaining Naylor's signature on a collective-bargaining agreement with it.

Gulf contends that the dispute is properly before the Board. It contends that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, arguing that the evidence shows that Pipefitters picketed Naylor in order to force the reassignment of work from Naylor's employees to members of Pipefitters. It also contends that Gulf, S.I.P. Engineering, and Naylor are not parties to, or bound by, any proceeding which would constitute an agreed-upon method for the voluntary adjustment of the dispute. Gulf further contends that the Board should award the work in dispute to the unrepresented employees of Naylor based on the lack of any certifications or collective-bargaining agreements covering the work in dispute and on the factors of employer preference and past practice, relative skills, and efficiency and economy of operations.

Kruger, vice president of Naylor's industrial group and its representative at the hearing, testified that Naylor preferred to use its own employees based on past practice, relative skills, and efficiency and economy of operations.

D. Applicability of the Statute

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As noted above, when Seymour told Little that S.I.P. Engineering wanted Naylor to do the work, Little responded that he "felt that it was pipe fitters' work and that he would have to put a stop to it." On August 4, when Breaux told Little that it was Naylor's business, Little responded that "if the situation could not be corrected, that they would have to put up a picket line on some of our gates." On August 6, the first day of picketing, Little told Cassidy that the dispute concerned the laying of plastic pipe, and "that was pipe fitter work." From August 6 until August 12, pipefitters picketed the gate Naylor's employees used with signs stating "PIPEFITTERS LOCAL 195 PROTESTS NAYLOR NO CONTRACT," thereby causing a cessation of work by both Naylor employees and employees of other contractors on those days. As previously indicated, Pipefitters contends that the

picketing was solely for an informational or at most recognitional objective. As noted above, in his conversations with Seymour, Breaux, and Cassidy, Little claimed the work for employees represented by Pipefitters. Further, Pipefitters engaged in picketing at Gulf's gates from August 6 to August 12, 1982. Although the picket signs referred to the lack of a contract between Naylor and Pipefitters, there is nothing in the record to support a finding that the picketing had solely an informational or recognitional objective, particularly since Little admitted that Pipefitters at no time asked Naylor to sign a contract, solicited employees to join Pipefitters, distributed organizational literature, or made inquiries as to the wages and working conditions of Naylor employees.³ Furthermore, both before and after picketing began Little made claims for the disputed work on behalf of employees represented by Pipefitters. Thus, we find there exists reasonable cause to believe that an object of the picketing by Pipefitters was to force and require Gulf, S.I.P. Engineering, or Naylor to assign the disputed work to employees represented by Pipefitters. Based on the foregoing, and on the record as a whole, we find that reasonable cause exists to believe that a violation of Section 8(b)(4)(D) has occurred.

No party contends, and the record discloses no evidence showing, that an agreed-upon method for the voluntary adjustment of this dispute exists to which all parties are bound. Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. Merits of the Dispute

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.⁴ The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.⁵

The following factors are relevant in making the determination of the dispute before us:

1. Certifications and collective-bargaining agreements

Pipefitters has not been certified by the Board as the collective-bargaining representative for a unit

³ *Essex County Building and Construction Trades Council, and its Constituent Members; et al. (Index Construction Corporation)*, 243 NLRB 249, 252 (1979).

⁴ *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO (Columbia Broadcasting System)*, 364 U.S. 573, 586 (1961).

⁵ *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

of Naylor's employees. Naylor has no employees represented by Pipefitters and has never had a collective-bargaining agreement with it. At the hearing, Little testified that a company known simply as "S.I.P." is signatory to a national contract with Pipefitters, and that such contract contains a clause stating "they are not to sub out work to a non-union contractor." However, Pipefitters did not produce a copy of this agreement.⁶ Furthermore, Seymour testified that he knew of no collective-bargaining agreement between Pipefitters and S.I.P. Engineering. Finally, there is no evidence of any other collective-bargaining agreement between Pipefitters and any of the parties herein requiring the work be assigned to employees represented by it. Accordingly, we find that the factors of certifications and collective-bargaining agreements are not helpful in our determination.

2. Employer preference and past practice

Naylor, through the testimony of Kruger at the hearing, expressed its preference that the disputed work continue to be performed by its unrepresented employees. Gulf, at the hearing through the testimony of Superintendent of Field Construction James and in its brief, stated that it awarded its contract to S.I.P. Engineering based specifically in part on S.I.P. Engineering's subcontracting the dredging work to Naylor, and expressed its preference that the disputed work continue to be performed by Naylor's unrepresented employees. Although S.I.P. Engineering did not formally appear at the hearing or file a brief, its senior buyer, Seymour, testified that S.I.P. Engineering prefers that the disputed work continue to be performed by Naylor's unrepresented employees. While we do not afford controlling weight to this factor, we find that it tends to favor an award of the disputed work to the unrepresented employees of Naylor.

Naylor's consistent practice since it began fabricating and laying polyethylene pipe in connection with dredging work has been to assign the joining, welding, carrying, and laying of 8-inch polyethylene pipe to its unrepresented employees. Naylor has done this both in prior projects for Gulf and in other projects in the area. Pipefitters presented no evidence of instances in which employees represented by it were assigned such work. We therefore find that the factor of employer past practice favors an award of the work in dispute to the unrepresented employees of Naylor.

3. Relative skills and efficiency and economy of operations

The record reveals that Naylor has a complement of longtime employees who are familiar with the type of work Naylor performs and are available on call. The record further shows that they are qualified to do the disputed work and have done so in a safe and workmanlike manner. Furthermore, it is uncontested that Naylor's employees are able to, and do, interchange job classifications, and that employees represented by Pipefitters would not have the same flexibility. Pipefitters presented no evidence that employees represented by it could perform the work in dispute more efficiently or economically. We find, therefore, that the factors of relative skills and efficiency and economy of operations favor an award of the work in dispute to the unrepresented employees of Naylor.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that the unrepresented employees of Naylor are entitled to perform the work in dispute. We reach this conclusion based on the facts that Naylor's assignment of the disputed work to its employees is consistent with its preference as well as the preference of Gulf and S.I.P. Engineering; that Naylor consistently has assigned such work to its unrepresented employees in the past and has been satisfied with their performance; that the unrepresented employees of Naylor possess the requisite skills to perform the work; and that such an award will result in greater efficiency and economy of operations. We shall therefore determine the dispute before us by awarding the work involved to the unrepresented employees of Naylor. Our present determination is limited to the particular dispute which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing factors and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. The unrepresented employees of Naylor Industries, Inc., are entitled to perform the joining, welding, carrying, and laying of 8-inch polyethylene pipe from a wastewater treatment pond for a distance of approximately 14,000 feet at the Gulf Oil Refinery in Port Arthur, Texas.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO,

⁶ We further find that Pipefitters did not establish that "S.I.P." is the same entity as S.I.P. Engineering. In this regard, we note that the record refers to "S.I.P., Inc.," and "S.I.P. Construction Company," as well as S.I.P. Engineering, as apparently separate entities.

Local 195, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Naylor Industries, Inc., S.I.P. Engineering, Inc., or Gulf Oil Corporation to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, United Association of Journeymen and Apprentices of the Plumbing

and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 195, shall notify the Regional Director for Region 23, in writing, whether or not it will refrain from forcing or requiring Naylor Industries, Inc., S.I.P. Engineering, Inc., or Gulf Oil Corporation, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.